

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

JUN 14 2007

COURT OF APPEALS
DIVISION TWO

COCHISE COUNTY PUBLIC)	2 CA-SA 2007-0056
DEFENDER'S OFFICE and ROBERT J.)	DEPARTMENT A
ZOHLMANN, Deputy Public Defender,)	
)	<u>DECISION ORDER</u>
Petitioners,)	
)	
v.)	
)	
HON. CHARLES A. IRWIN, Judge of the)	
Superior Court of the State of Arizona, in)	
and for the County of Cochise,)	
)	
Respondent,)	
)	
and)	
)	
THE STATE OF ARIZONA,)	
)	
Real Party in Interest.)	
)	
)	

SPECIAL ACTION PROCEEDING

Cochise County Cause No. CR200400351

JURISDICTION ACCEPTED; RELIEF GRANTED IN PART

Mark A. Suagee, Cochise County Public Defender
By Kelly A. K. Smith

Bisbee
Attorneys for Petitioners

Terry Goddard, Arizona Attorney General
By Marjorie Becklund

Tucson
Attorneys for Respondent

¶1 This court has considered the petition for special action filed by the Cochise County Public Defender's Office and attorney Robert J. Zohlmann and the exhibits attached thereto and concludes that further proceedings are necessary to properly resolve the issue raised. Therefore, this court accepts special action jurisdiction and grants partial relief to the limited extent stated below. *See Maricopa County Pub. Defender's Office v. Superior Court*, 187 Ariz. 162, 164, 927 P.2d 822, 824 (App. 1996) (special action review appropriate for challenge to denial of counsel's motion to withdraw).

¶2 This court acknowledges the Sixth Amendment to the United States Constitution entitles a criminal defendant to representation by competent counsel, but a defendant does not have the right to "a meaningful relationship with his or her attorney." *State v. Cromwell*, 211 Ariz. 181, ¶ 28, 119 P.3d 448, 453 (2005), *cert. denied*, 126 S. Ct. 2291 (2006). This court also recognizes that a simple disagreement between a defendant and his or her counsel as to strategy or a clash of personalities does not automatically entitle the defendant to substitute counsel, nor does it require a trial court to grant an attorney's request to be removed from a case. *See id.*; *see also State v. Henry*, 189 Ariz. 542, 547, 944 P.2d 57, 62 (1997); *State v. Bible*, 175 Ariz. 549, 591, 858 P.2d 1152, 1194 (1993); *State v. LaGrand*, 152 Ariz. 483, 486-87, 733 P.2d 1066, 1069-70 (1987). But "[t]he

presence of an irreconcilable conflict or a completely fractured relationship between counsel and the accused ordinarily requires the appointment of new counsel.” *Cromwell*, 211 Ariz. 181, ¶ 29, 119 P.3d at 453. “[F]orcing a defendant to go to trial with counsel with whom he has a completely fractured relationship constitutes a deprivation of the right to counsel, which is structural error.” *State v. Torres*, 208 Ariz. 340, ¶ 12, 93 P.3d 1056, 1060 (2004); *see also State v. Moody*, 192 Ariz. 505, ¶ 23, 968 P.2d 578, 582 (1998) (same); *Henry*, 189 Ariz. at 547, 944 P.2d at 62 (“[T]he presence of a genuine irreconcilable conflict *requires* the appointment of new counsel.”).

¶3 Zohlmann insisted below, as he does in this special action proceeding, that there is an irreconcilable conflict between him and Michael Cunningham, the defendant in the underlying proceeding, and that their relationship is completely fractured. We express no opinion on the sufficiency of the record supporting that contention before Zohlmann filed his motion for reconsideration. But events that took place after the May 10, 2007 hearing on Zohlmann’s motion to withdraw at which the respondent judge denied the motion, and that Zohlmann set forth in general terms in his motion for reconsideration, raise at least a colorable claim that the attorney-client relationship is plagued by irreconcilable conflict and is completely fractured. *See Cromwell*, 211 Ariz. 181, ¶ 30, 119 P.2d at 454. (“To constitute a colorable claim, . . . [the] allegations must go beyond personality conflicts or disagreements with counsel over trial strategy.”). And, although the respondent judge held a hearing on the original motion, given the new events alleged in the motion for

reconsideration, the respondent judge should have conducted a second hearing to explore this issue, as our supreme court directed in *Torres*, 208 Ariz. 340, ¶ 8, 93 P.3d at 1059.

¶4 Zohlmann is correct that he cannot disclose communications that are protected by the attorney-client relationship, *see generally* ER 1.6, Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42, 17A A.R.S., and that he should not be compelled to disclose such information in order to obtain the respondent judge's permission to withdraw from the case. *See State v. Lee*, 142 Ariz. 210, 220, 689 P.2d 153, 163 (1984) ("In requesting permission to withdraw, counsel should not, however, inform the court of the specific basis for the request. Counsel should state only that an irreconcilable conflict has made continued representation extremely difficult."); *see also Maricopa County Pub. Defender's Office*, 187 Ariz. at 167, 927 P.2d at 827, *citing* Comment to ER 1.16, Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42, 17A A.R.S. Zohlmann is also correct that counsel's avowals in these kinds of circumstances must be given great weight. *See id.*; *see also Holloway v. Arkansas*, 435 U.S. 475, 484-87, 98 S. Ct. 1173, 1178-80 (1978); *State v. Davis*, 110 Ariz. 29, 31, 514 P.2d 1025, 1027 (1973); Comment 3 to ER 1.16 ("The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient."). But Zohlmann can and should divulge any nonconfidential information to support his request to withdraw in order to assist the respondent judge and to permit this court to conduct a meaningful review of the respondent's decision. Furthermore, he can potentially divulge otherwise confidential information in the limited circumstances provided for in the ethical

rules. *See* ER 1.6. Disclosure is particularly necessary here, given the lack of specific, factual information in the record, in contrast with the record in *Moody*, which the supreme court characterized as “replete with examples of a deep and irreconcilable conflict” between Moody and his counsel. 192 Ariz. 505, ¶ 13, 968 P.2d at 580.

¶5 It is therefore ordered that the respondent judge conduct a hearing on the motion for reconsideration in accordance with *Torres* and consistent with this order. Although we recognize the respondent entered two thoughtful orders in this matter, the respondent is directed to enter and forward to this court additional findings after the hearing. The respondent shall address, at a minimum, whether the relationship between Zohlmann and the defendant is “completely fractured . . . either because of an irreconcilable conflict or because of a total breakdown in communications.” *Torres*, 208 Ariz. 340, ¶ 18, 93 P.3d at 1061. The respondent judge is further directed to reconsider his previous order denying Zohlmann’s motion to withdraw in light of this court’s order and the information provided at the hearing on the motion for reconsideration.

¶6 It is further ordered staying the proceedings in the trial court in the underlying criminal action, other than the hearing ordered herein. Although this may well result in a continuance of the trial, that result serves the judicial system better than a remand for a hearing after a trial, conviction, and appeal. Zohlmann is directed to file the trial court’s order with a notice withdrawing his petition or a request for further review, without argument, as soon as it is available. If the order is not available before July 16, 2007,

Zohlmann shall file a status report on that date, informing this court of the status of the trial court proceedings.

JOSEPH W. HOWARD, Presiding Judge

Chief Judge Pelander and Judge Vásquez concurring.